CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

Friday, July 7, 2000

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:37 a.m. at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Bill Deaver, Kathleen Makel and Gordana Swanson were present.

Item #1. Approval of the Minutes of the May 5, 2000 Commission Meeting.

The minutes of the June 2nd, 2000, Commission meeting were distributed to the Commission and made available to the public. Commissioner Swanson requested a modification to item #3 (page 6). There being no objection, the minutes were approved with the modification proposed by Commissioner Swanson.

Item #2. Public Comment.

Peter Bagatellos, representing the California Political Attorneys Association (CPAA), announced that he had replaced Ron Turovsky as the Chairman and President of the CPAA.. He encouraged the Commission to contact him if the CPAA could help the Commission. Mr. Bagatellos welcomed Commissioner Swanson to the FPPC and invited her to speak at a CPAA meeting.

Chairman Getman congratulated Mr. Bagatellos.

Item #3. Consideration of the Opinion Request in the Matter of *In re Solis* (O-00-104).

Senior Counsel Hyla Wagner reported that the opinion before the Commission had been approved by the Commission at the June FPPC meeting by a four to one vote and was being presented to the Commission for adoption.

Chairman Getman motioned that the opinion be adopted as written. Commissioner Deaver seconded the motion. Chairman Getman and Commissioners Deaver and Swanson voted aye. Commissioner Makel voted nay. The motion carried by a 3-1 vote.

Commissioner Makel stated that she may write a dissent.

Item #4. Prenotice discussion of Regulation 18465--Disclosure of Lobbying Entity

Identification Numbers.

Chairman Getman noted that an alternative proposal for the language had been developed and copies were available to the public.

Technical Assistance Division Chief Carla Wardlow explained that this regulation had been requested by the Secretary of State's office, and would require lobbying entities which are required to file electronic disclosure reports, to include on those reports identification numbers assigned by the Secretary of State's office to each lobbying entity that registers and files reports with them. The identification number is needed, she explained, in order to link clients with firms, and employers with their employee lobbyists for purposes of the Internet display for the public.

Ms. Wardlow explained that the alternative language presented was simpler. She suggested adding to the proposed alternative language, "The requirement of this section is not applicable to reports filed on paper." She noted that this would provide a legal reference for Technical Assistance staff to use when advising the public.

David Hulse, from the Secretary of State's Political Reform Division, agreed with Ms. Wardlow because he received many questions from the lobbying community regarding electronic filing. He explained that the identification number was needed to identify relationships between firms and clients on the Internet, and that he anticipated that the public would have questions regarding whether the information was required on the paper filing forms. Including this statement in the regulation, he stated, would clarify the rule for the public.

Ms. Wardlow noted that she had circulated the proposed regulation to the vendors currently working with the Secretary of State.

There being no objection, the alternative regulation was approved on consent, with the inclusion of subsection (b), "The requirement of this section is not applicable to reports filed on paper."

Item #5. Prenotice Discussion: Conflict of Interest Regulations ("Phase 2"): Projects I, J, and K ("Public Generally" Exception); Prenotice discussion of proposed amendments to Regulations 18707, 18707.2, and 18707.4, Repeal and Reenactment of Regulation 18707.1 with Amendments, Adoption of Regulations 18707.8 and 18707.9, and Renumbering of Regulation 18707.3 to 18707.7.

Assistant General Counsel Luisa Menchaca reviewed the status of the project thus far, noting that staff held another Interested Persons meeting with tenants, landlords, real estate business persons, and city attorneys. She reported that staff incorporated their ideas and suggestions as well as comments from the Enforcement and Technical Assistance Divisions and developed a draft addressing the issues in projects I, J, and K. Ms. Menchaca clarified that this was a prenotice discussion of the projects, and that staff anticipated that the Commission would make a number of decisions which would allow the staff to proceed to finalize the language. She noted that discussions of the regulations would occur in September, and OAL adoption would take place in December, and actual notices published through OAL are anticipated to be available sometime in

October. Ms. Menchaca explained that there has been a lot of interest from the public and noted that the public will have more opportunities to provide input.

Ms. Menchaca introduced the first decision point before the Commission, which revolved around how the staff treats "public generally." She explained that the Commission historically treated "public generally" as an exception, and noted that there had been public concern about the appropriateness of that exception. The Commission, she noted, had not had a discussion considering this exception in great detail. If the Commission chooses to treat "public generally" in a way other than as an exception, Ms. Menchaca added, staff will have to reconsider its approach to the regulatory changes.

Chairman Getman explained that the statute appears to make it an element of the initial decision rather than an exception, but noted that the first Commission's regulation treated it as an exception.

Ms. Menchaca stated that the distinction between the two approaches is primarily the burden of proof issues. She explained that if the "public generally" rule is treated as an exception, the burden of proof is on the public official. If it is not treated as an exception, she continued, the FPPC Enforcement staff believed that they would have the burden of proof.

Chairman Getman clarified that the 1976 regulation seemed to create a presumption that the material financial effect is distinguishable from the public generally.

Ms. Menchaca agreed, and noted that in the *Consumer's Union* case, the courts upheld that 1976 version of the regulation. She explained that there have been amendments to the regulation since then, but that those amendments have been consistent with the 1976 regulation.

The first decision point, Ms. Menchaca explained, addressed the burden of proof issue (option a) and set out several steps (a "road map") for a public official to follow in order to determine whether they can participate in a governmental decision (option b). She noted that it is not enough to determine that a significant segment of the public is affected, but that the financial effect must be substantially similar to the financial effect on the public official.

Ms. Menchaca believed that these two options would be helpful to the public, and pointed out that if people are confused about whether the general rule in the existing regulation 18707 applied, this would provide a starting point to find out if other regulations applied.

Chairman Getman stated that the "road map" was a wonderful idea, but she was concerned about the burden of proof issue.

Ms. Menchaca clarified that the proposed option would clearly set up a presumption that a public official would have to show that the financial effect is not distinguishable from the effect on the "public generally."

Stan Wieg, from the California Association of Realtors, stated that he believed that "public generally" was an element of the offense that needed to be proved by the prosecution. He was troubled by the presumption in option a. Mr. Wieg liked the "road map," but noted that it uncovered the need for a very clear standard for the public official to meet, so that the public official can be assured that they have done everything sufficiently to be safe under the analysis. He cautioned the Commission that it should not establish a presumption that might lead to a sanction.

Ms. Menchaca stated that there is nothing to preclude the public from providing statistics or data to the public official to allow them to meet the exception.

Chairman Getman explained that option a would not prevent anyone from presenting evidence on either side, and that the Commission could consider that evidence. The question, she noted, was who had the responsibility of proving the financial effect. This would be a significant change and would reverse the way staff has approached this issue for twenty-five years.

Commissioner Swanson questioned whether the FPPC would have the resources to provide the proof.

Chairman Getman noted that the question could be whether the public official should have to find the resources to provide the proof.

Commissioner Makel stated that the statute outlines that the prosecution would have to show the proof.

Chairman Getman stated that criticisms of the FPPC because of the perception that too many public officials are disqualified could have stemmed from treating the "public generally" as a narrow exception rather than treating it as an essential element which should be considered.

Ms. Menchaca pointed out that staff cited in a footnote that the current interpretation is consistent with the purposes of the PRA in its entirety. The statute, she noted, sets up presumptions in the material financial effect element, and is similar to this proposed presumption. From an advice standpoint, Ms. Menchaca stated, a public official is deemed to be materially financially affected in some situations and that for purposes of advice, a presumption is set up that "public generally" is not met.

Chairman Getman questioned whether this would collapse "public generally" with material financial effect. She pointed out that just because it is deemed to be a material financial effect, it does not mean that it is deemed to be distinguishable from the effect on the public generally.

Ms. Menchaca did not agree that it would collapse "public generally," but viewed it as applying another concept.

Commissioner Makel questioned whether changing the statute to read "unless it is

distinguishable from its effect on the public generally," would make it clear that the way the Commission had interpreted the statute was correct.

Chairman Getman suggested that this issue needed further study. She stated that changing 25 years of interpretation could have far reaching implications, and may not be necessary.

Ms. Menchaca suggested that the Commission have further discussion of Decision 1 option a in September, noting that more of the implications could be discussed, and suggested that option b of Decision 1 may need to be changed to conform to whatever language is used in option a.

Chairman Getman agreed with Commissioner Makel's suggestion for good statutory construction analysis, noting that there are different interpretations of the statute in its current form.

Ms. Menchaca suggested that the statutory construction analysis be developed in a separate memo.

Commissioner Deaver noted that he was moving toward the philosophy that everything be disclosed, the public official be allowed to vote, and the voters decide through the election process whether the public official should be reelected.

Ms. Menchaca stated that Decisions 2 through 8 related to Project K, streamlining of the existing "public generally" regulation 18707. She suggested that, in Decision 2, the regulation be split in two, with regulation 18707 including the general statutory language, the presumptive language discussed in Decision 1, and the road map. A new proposed regulation 18707.1, she added, would allow the "public generally" analysis to be in a separate regulation so that it will be more easily available.

There was no objection from the Commission to accept staff's recommendation for Decision 2.

Ms. Menchaca explained that Decisions 3-7 relate to the alignment of the existing regulation to the type of person or real property that is affected. Option a of Decision 3 outlines what the test would be if individuals are affected, she explained. Ms. Menchaca discussed the current regulations.

Commissioner Deaver stated that he was concerned about Decision 3 option c, noting that in a rural community, 5,000 people would be most of the community, while in an urban area 5,000 people would be a very small amount. He stated that a percentage rule would be enough and the rule of 5,000 people should be taken out.

Ms. Menchaca agreed, and noted that staff has proposed that the test rule be moved for that reason. Currently, she stated, it is a "catch-all" provision and has caused confusion about when to apply the test. This only works, she explained, when individuals are affected and are trying to compare who is affected in a substantially similar manner. Therefore, she said, staff proposed that the significant segment continue to be comprised of ten percent or more of the population

and moving the "5,000 individuals" test so that it applies when the public official is personally affected by the decision, as an individual, or when there is a source of gifts or income that is an individual.

Scott Hallabrin, from the Assembly Ethics Committee, provided some background to the "public generally" exception, noting that he worked at the FPPC when that exception was adopted. He explained that the Commission, at that time, believed that at a certain threshold at which enough people are affected that it no longer mattered how large the jurisdiction was.

Chairman Getman noted that in a San Francisco example, 1.6% of the population equaled 11,500 people, and that while it may appear that a public official's interest is similar to the interest of many other individuals, that number of people would still not be enough to elect the public official in that jurisdiction.

There was no objection from the Commission to retain the "5,000 individuals" test and to tentatively move the regulation as recommended by staff.

Ms. Menchaca explained that, for most people, the "household" standard outlined in Decision 3, option b is very confusing and that staff recommended deletion of that standard.

Commissioner Makel stated that she supported deletion of that standard because she agreed that the population standard made more sense.

Mr. Hallabrin stated that, under the definitions of the Act, there is not a real property interest if there is a month-to-month tenancy. He added that one reason for the "household" definition may have been because there are renters who have less than a month-to-month tenancy, and have no real property interest under the Act.

Ms. Menchaca noted that, minimally, staff recommended that the "household" rule be moved to the individual's test. She added that it does no harm if it is left under the population test, but noted that it is a movement from the real property subdivision to another subdivision that applies when individuals are affected.

Commissioner Deaver pointed out that "household" is an imprecise term.

Senior Enforcement Counsel Deanne Canar stated that "household" is not a statistic and is not information that is available, and is meaningless from an Enforcement point of view.

Ms. Menchaca stated that "household" information is available.

There was no objection from the Commission to the deletion of the term "household."

Ms. Menchaca explained that Decision 4 related to impacts on real property, and would apply

when an official's real property is affected and when determining whether a significant segment of the public has been impacted. She explained the current rule, and stated that staff recommended that the current rule be retained, but that the "household" language be deleted from it in the context of real property.

There was no objection from the Commission to staff's Decision 4 recommendation.

Ms. Menchaca explained that Decision 5 involved the significant tests applicable when an economic interest is triggered by a business. She noted that the current rule requires that 50% of all businesses in the jurisdiction or district would be impacted by the decision, and she reiterated that, under the staff's recommend restructuring, the "5,000 individuals" test would not apply when a business interest is affected. She noted that the test was difficult to apply and seldom used. They are measured, she said, by the numbers of the businesses, not the value of the businesses.

Commissioner Swanson noted that the two types of measurement are distinctive.

Mr. Wieg stated that 50% of all of the businesses in the jurisdiction is a very tight standard and would be a very high hurdle to clear, and questioned whether it had ever been applied.

Ms. Menchaca responded that it is applied often on the business climate decisions.

Mr. Wieg suggested that the Commission use "businesses that are similarly situated," with 50% of those having a lower threshold, or examine a lower threshold. He questioned how that could be applied to an urban growth boundary issue, noting that it could be argued that it is a business climate issue that will affect more than 50% of the businesses, but distinguishing that effect would be difficult, and he urged caution is establishing the 50% percentage.

Ms. Menchaca stated that data is available showing population figure trends, and the percentages could be discussed at the adoption stage for further consideration.

Chairman Getman stated that her understanding of Mr. Vergelli's memo was that, with a two-tiered system and a "public generally" type of test for the second tier, one of the decisions the Commission would need to make was whether 10% is a sensible number.

Ms. Menchaca responded that, in the Chairman's example, the bigger issue was how "substantially the same manner" was viewed.

Chairman Getman suggested that this issue be considered at the September meeting to allow the Commission to discuss other issues that might affect this one.

Ms. Menchaca agreed, noting that it would give her the opportunity to analyze the Project A decisions. Because the materiality regulations may be eased up in that Project, she noted, the proposed percentage may be appropriate

There was no objection from the Commission to removing the "5,000 individuals" test out of the portion of the regulation that deals with business entities.

Chairman Getman adjourned the meeting for a break at 10:40 a.m. The meeting reconvened at 10:50 a.m.

Ms. Menchaca introduced Decision 6, which would provide when nonprofit entities constitute a "significant segment." Currently, she explained, there is no subdivision that applies when a nonprofit business is a source of income in the "public generally" context. She noted that the language she was proposing used the 50% test that was applicable to business entities because nonprofits are entities, but that it would be linked to the constituency served by the nonprofit entities. She added that it may be fairly narrow if there are only a few nonprofit entities in a jurisdiction, and that a significant segment could constitute a small group of individuals in the jurisdiction.

Ms. Menchaca noted that this issue has been a problem in the past, and gave an example. If a public official worked for a nonprofit entity, and a grant issue would impact that nonprofit entity, she explained, and the public official would be disqualified from participating in the RFP process for the nonprofit employer, then the public official would apply this test to see if participation would be allowed by utilizing the public generally exception. Under current law, the public generally exception could only be allowed if it could be applied using the 10% population test, Ms. Menchaca added.

Commissioner Swanson questioned whether nonprofit entities should be included. She stated that the regulation should be clarified for the benefit of nonprofit entities. Commissioner Swanson questioned the potential for political corruption when an employee of a nonprofit entity who is also a public official, had to make, for example, a grant decision which might affect the nonprofit entity.

Ms. Menchaca responded that, as an employee of the nonprofit entity, approval of the grant could affect the public official's salary at the nonprofit entity.

Chairman Getman explained that the current law would disqualify the public official in Commissioner Swanson's example, from participating, and that the staff proposal would allow the "public generally" exception to apply, so that the public official could participate in the decision.

Commissioner Deaver stated that he saw no difference between the nonprofit getting a contract and a business-for-profit getting a contract.

Ms. Menchaca noted that the 50% business test in Decision 5 could be worded to read "50% of businesses or nonprofit entities in the jurisdiction."

Commissioner Deaver responded that it might be a good idea because it should be uniform.

Mr. Wieg stated that he liked the test, but that it should apply to both businesses and nonprofit entities.

Michael Martello, City Attorney of Mountain View, stated that this issue does come up often, and that there is no guidance in the PRA dealing with it. He agreed that there should be some guidance in the "public generally" exception.

Commissioner Deaver suggested that the Act include reference to Government Code Section 1090 for purposes of uniformity.

Mr. Martello responded that efforts are underway to explore this option.

Chairman Getman noted that the suggestion has been presented to the Commission at least twice before, but that it was rejected by the Commission.

Mr. Martello stated that treating nonprofit entities differently than all other business might work, but he was not certain. Because the Act provides little guidance, he noted, the City Attorney refers to section 1090 for guidance. He added that he disagreed with the Attorney General's opinion as to why a nonpaid board member of a non profit entity could participate, but that he could see some situations where it would apply.

Ms. Menchaca stated that the 50% test applied to businesses would work. She clarified that if a nonprofit entity served senior citizens, it would need to be determined that at least 50% of the nonprofit entities in the jurisdiction that serve senior citizens are affected, and noted that it could result in a very small group. If combined with the businesses, she added, the test would be 50% of the nonprofit entities in the jurisdiction or the district, regardless of whether they are similar.

Chairman Getman noted that the proposal gives non-profit entities a different test, which would compare that nonprofit entity with similar nonprofit entities, and would allow the "public generally" exception if 50% of the similar nonprofit entities are affected.

Ms. Menchaca offered to rewrite the subdivision so that it include both the 50% business test and the current proposed test so that the Commissioners could consider both of them together.

Chairman Getman stated that she did not see why the nonprofit entities should be treated differently.

General Counsel Kathy Gnekow stated that the Act defines business entities as being "for profit groups," and that by that definition, nonprofit entities have been left out. She suggested that nonprofit entities should be included in some way.

Peter Bagatellos questioned the definition of nonprofit entities, noting that they take many forms, and noted that the IRS only determines tax status, not the form of the organization. He asked the Commission if an organization must be exempt from tax under 501(c) to qualify for the exception, noting that some nonprofit organizations are not exempt from taxes under 501(c).

Chairman Getman explained that non profit entities would include traditional charities, hospitals, trade associations, neighborhood associations, etc., and would include a huge segment.

Mr. Bagatellos noted that it would be difficult to identify in a city like San Francisco.

Commissioner Deaver stated that the definition should have to do with someone making some money.

Chairman Getman suggested that the similarity might be compared with the type of nonprofit entity that it is, instead of comparing it with the population group.

Ms. Menchaca did not support that change, noting that staff was trying to create a subdivision that applies to any entity that is not for profit, and was intended to cover more than those entities covered under 501(c)(3). The proposal, she explained, covered businesses, not-for-profit entities, and government, and intends to include any entity. She suggested that the wording could be changed, using "entity that is not for profit as defined in Government Code section 82005." Ms. Menchaca noted that "nonprofit" is not currently defined under the Act.

Ms. Menchaca suggested that, for purposes of uniformity and simplicity, the Decision 5 "business entity" test could be used by changing it to read, "50% of businesses or entities that are not for profit," would work, and would not require a determination of the type of population group nor the type of nonprofit group.

Chairman Getman noted that since there was no way to know how many nonprofit entities there are in a jurisdiction, there would be no way to determine how many would comprise 50%.

There was no objection from the Commission to tentatively agree that nonprofit entities should have some sort of "public generally" significant segment test in the regulations, but asked staff to bring a proposal back to the Commission with further discussion of what that test should be. She requested that staff explore how to define the nonprofit population if the business entity test were used, and to explore whether to use the narrower test.

Ms. Menchaca explained Decision 7, which pertains to a proposed new segment which would apply to situations where a governmental entity would be a source of income or gifts for a public official. She noted that the "benefit flows to the public" concept has been applied, which allows public officials to participate when a governmental entity is a source of income for a public official. She requested that if the Commission agrees with the concept that there should be a significant segment subdivision that works when governmental entities are a source of income or gift, that they proceed with refining the language to ensure that it is not too broad or too narrow.

Currently, Ms. Menchaca explained, determining whether the benefit flows to the population is done on a case by case basis by staff, and that there is no rule. She noted that staff should not be developing this policy.

There was no objection from the Commission to developing a segment for government entities.

Ms. Menchaca directed the Commission to the summary of Decisions 3 through 7 on page 11 of the staff report. She asked for direction from the Commission regarding whether they agree with the restructuring proposals in general regarding significant segment.

Mr. Martello stated that the proposal was a lot more than restructuring. He noted the real property distinctions, and stated that if the Commission removes the "5,000 persons" rule and if they take out the population tests, it eliminates situations where the public official's real property is involved but they might qualify for the "public generally" exception. Mr. Martello stated that the rules, as they existed, tried to take care of the fact that California is a geographically varied state. He stated that the "5,000 individuals" should be applied because it is a large amount of people, and that the "10% of the population" rule does not allow anyone to participate.

Ms. Menchaca stated that she could draft two versions which would consider both options. Under the existing regulation, she added, there are "exceptional circumstances," test, and the "5,000 individual residents" test could be similar. The primary problem with this, Ms. Menchaca noted, is the potential application to business entities, because it does not work in situations where businesses are affected. To clear up that ambiguity, she requested that the exception not apply in those situations, and that a percentage business entity test be applied instead. She suggested that it be left in the section, but that it be bracketed and put at the end with clarifying language explaining that it would apply in all situations except when businesses are affected. She offered to bring back to the Commission information that would further show what is meant by "5,000 individual residents," and what type of jurisdictions would be impacted by that.

Commissioner Deaver commented that if a community had 25,000 people, and a councilmember lived in an upscale neighborhood of around 5,000 people, and a decision was required to determine whether a golf course should be built there, the "5,000 individual" test should not apply because it would not constitute the "public generally."

Ms. Menchaca noted that if there are districts, the exception could apply to 10% of the district, which is a much smaller amount, and would allow some flexibility of the percentage test.

Chairman Getman asked Ms. Menchaca to prepare more data and bring it back to the Commission in September.

Polly Marshall, a commissioner from the San Francisco Rent Board and with Affordable Housing Alliance, cautioned against using "all tenants" in the language because many tenants are precluded from being covered by rent control and would not be affected by rent control decisions. She suggested using a lesser number or a percentage.

Ms. Menchaca responded that "all" is not currently in the regulation.

Chairman Getman stated that the Commission supports in general the table on page 11, noting that the Commission will want to study the specific numbers later.

Ms. Menchaca explained that the staff did not draft specific language to define "substantially the same manner," but noted that when a public official's property is within 300 feet of property which is subject to a decision, staff has advised that, in order for the official to participate through the "substantially the same manner" definition, 10% of the population has to be within the 300 foot radius. She stated that she did not know where staff found the authority to give that advice, but she added that the proximity of the public official's property to the property which was the subject of the decision was close enough that everyone in that area should be affected in the same way. Ms. Menchaca stated that if the Commission rejected Decision 8, staff would have to rescind the advice.

Chairman Getman questioned how staff gave the advice in the first place.

Ms. Menchaca responded that people who are closer to the property which is subject to a decision are affected differently than people who are farther away.

Chairman Getman stated that the 10% rule would not apply in those cases.

Ms. Menchaca clarified that the 10% rule had already been established in the example, and the question was whether they were impacted in the same manner. She stated that in situations where a property is close, at least 10% of the people must be affected.

Commissioner Deaver questioned whether there was any place in California that would fit that criteria.

Ms. Menchaca responded that it would have to be a very small community for this exception to apply, but noted that in the last six months, four or five advice letters have dealt with this issue.

Chairman Getman questioned whether there were cases in which staff determined that the "public generally" exception did not apply even though 30% of the population in the jurisdiction was going to be affected, because another "layer" had been created which narrowed the "public generally" exception further.

Ms. Menchaca responded that they were not affected in a similar manner. She explained that staff has carved out a rule allowing that distance makes a difference.

Staff Counsel John Vergelli stated that this is used when trying to determine the definition of "substantially the same manner". Staff tried to provide a "rule of thumb" to help make that estimation. Staff developed the 300' rule, because staff reasoned that, since 300' was accepted as a special category for other purposes, it would work to help define "substantially the same impact."

Chairman Getman responded that there is already a rule for people who are closer, and that this appears to create a different "public generally" rule in addition to a materiality standard.

Ms. Menchaca noted that this recommendation was presented to the Commission as a result of a public comment, noting that it could be a concern because advice letters almost presume that the effect has to be identical.

Commissioner Makel noted that "substantially similar" does not mean "identical", and should mean that if property values are going to increase, then all the property values are going to generally increase, and not necessarily by the same exact amount. It would allow for differences as the property gets further away, she added.

Ms. Menchaca explained that the staff reasoned that when the property is close, there is a presumption and unique effect and that the "public generally" should not apply.

Chairman Getman pointed out that the statute states that "public generally" applies, no matter where the property is.

Ms. Menchaca noted that rejecting Decision 8 would require that staff handle these issues on a case-by-case determination.

Commissioner Deaver asked where this situation existed in California.

Ms. Menchaca responded that Emeryville was one such case.

There was no objection from the Commission to rejection of Decision 8.

Ms. Menchaca introduced the Project I discussion, addressing the concern that some public officials who belong to a particular trade or profession are disqualified more than others. Decision 9, option a, would delete the current limitation that the "public generally" does not apply when a single industry or profession is affected. Under the current rule, she noted, 50% of businesses have to be affected and more than a single industry, trade or profession must be affected. This would help, she explained, because if more than 50% of the businesses in the jurisdiction are affected, but it is just one single industry, trade or profession that is affected, the general rule will not likely apply.

Another approach, Ms. Menchaca continued, would be to keep the current rule, but add a special, "business climate" issue rule. Decision 9, option b, would create that regulation. She explained that the "general business climate" is defined in terms of percentages of businesses affected, not in terms of the type of decisions. A "no growth" ordinance would have to have a significant financial effect on 50% or more of all businesses in the jurisdiction or the district the official represents, or a certain percentage of all businesses in the jurisdiction or the district the official

represents and 10% of a population group or property owners. This would allow participation by public officials when there is a single industry, trade or profession being affected, but it is not a predominant industry, such as in a company town situation, she added.

Ms. Menchaca stated that if the issue did not affect the entire community, this regulation would require that the impact affected a high percentage of businesses in a significant way, or would allow a lower percentage of businesses to be affected if some other segment of the community is also affected. She stated that business climate issues must have an across-the-board effect on the entire community, not just businesses.

Chairman Getman noted that Decision 9, options d or e would only work if the decision did not have to affect everyone in substantially the same manner because businesses and the population and property owners would not be affected in substantially the same manner.

Commissioner Deaver hypothesized that if a real estate businessperson is also a member of a city council and votes to approve a large residential development, it would positively affect both the real estate industry and the retail industry and could positively effect residents in the community because more development meant more options for retail outlets, and he noted that he knew of communities who would love to have that happen.

Commissioner Deaver also noted that people who are not in the real estate business could be more affected than people in the real estate profession.

Ms. Menchaca stated that there is a "substantially similar manner" aspect of the regulation, but that it is in a different subdivision. Under Decision 9, options d and e, she noted, as long as enough people are being affected, they don't have to be similarly affected. The requirement for similar affect would be in the staff draft proposal Decision 9, option a.

Ms. Menchaca clarified that under Decision 9, option d and e, the businesses have to constitute a significant segment. As an example, she explained, if the real estate brokerage business represented 5% of all businesses in a jurisdiction, and those businesses would be affected in substantially the same manner from a proposal, and if the decision also affected, in any way, a certain percentage of all businesses, and the population or real property owners are affected in any way, the exception would apply. If a real estate broker would have an exclusive listing to sell all of the property in the proposal, the broker would probably be disqualified from participation because the broker would be affected in a different manner.

Ms. Menchaca pointed out that the major differences between option c and options d and e, are that the effect on the businesses would have to be significant, adding an aspect of similarity to the "business climate." Subdivision d does not have that similarity and is a looser standard, she pointed out, and added that "significant effect" should probably be added to subdivision d.

Commissioner Deaver noted that he did not like the idea of using the word "significant" because

it is difficult to interpret.

Chairman Getman asked whether the proposal on page 4 of the regulation, which would eliminate the words "so long as the segment is composed of persons other than a single industry, trade, or profession; or," would accomplish the same goal.

Ms. Menchaca responded that it would, but it would be a departure from twenty-five years of opinions and advice.

Commissioner Deaver stated that it needed to be reasonable so that people can participate, and that it did not matter if it departed from past opinions and advice.

Ms. Menchaca stated that if the words were eliminated, it would leave a 50% business entity test rule that would apply to the real estate, even if it was just one industry that was being affected, and the subdivision would apply a case-by-case analysis to determine if the effect is in a similar manner.

Mr. Wieg stated that he supported the direction of the Commission, and, preliminarily, option c would be the equivalent of eliminating the inability of a single business, trade or profession to constitute a significant segment. To make that work, he noted, it would be better to discuss similarly situated entities, otherwise a "double similarity" test is created. If options d and e are considered, he added, it could be done as, "either 10% of the businesses in the jurisdiction" or "10% of the population," because if 10% of the population has a significant financial effect, it is the "public generally." If the employment figures in a community are changed by 5% - 10% in a community, he noted, the business climate has been changed. Mr. Wieg supported an approach that provided two ways to analyze the business climate, because it was easier to interpret because the official only had to meet one of the standards.

Mr. Wieg noted that his comments were preliminary because he had not yet had time to carefully study the proposals, and added that the proposal was not real estate specific, and would apply to all businesses. He stated that "substantially similar" language created Enforcement difficulties, and encouraged the Commission to find a "stick out like a sore thumb" test.

Ms. Menchaca stated that the staff would oppose Mr. Wieg's suggestion that the language for criteria in options d and e be changed from "and" to "or" because it would destroy the "50% business entity rule." She noted that it is important to remember that the reason that the public official was in the position was because of the business interest, and that if, for "public generally" purposes it was determined that the 10% population test be applied, then the "50% business entity test" would not be needed and would not work. She agreed that there was confusion over the issue, and suggested that if public officials are helped to categorize and identify what is first affected, it would be much simpler. She was very concerned that the "business entity" issue, as a very different test, could result in weakening other parts of the regulation. She recognized that situations do exist where 50% of the businesses are not affected and it seems harsh because there is another effect on a different segment, and suggested that the Commission might want to provide some ease to the real estate and other businesses, but cautioned that they should not go as

far as to say that none of the other segments would apply.

Commissioner Makel questioned whether "50% of businesses or 10% of businesses" would work.

Chairman Getman responded that they are almost two different tests.

Ms. Menchaca noted that both options c and d could be selected, and noted that the "significant financial impact" language in subdivision d would probably be important to retain from an enforcement standpoint.

Chairman Getman responded that keeping that language would change it completely, and agreed with Commissioner Deaver's observation that the word "significant" needs definition.

Ms. Marshall stated that "significant" needed to be in the regulation under options d and e, especially when discussing "business climate," because "effect" by itself was too broad.

Chairman Getman suggested that the language might be changed to "financial." She agreed that "effect" was very broad.

Chairman Getman suggested that the Commissioners supported the idea of having some kind of a "business climate" test as discussed, but that staff should further study and refine the proposal and return it to the Commission with more specific language.

Ms. Menchaca asked the Commission if they wished to consider retaining the limitation to a single industry, trade or profession (Decision 9, option a).

Chairman Getman responded that if 50% of the businesses are affected it should not matter whether it is a single industry or not, and suggested eliminating that language. There was no objection from the Commission. Chairman Getman stated that she still wanted to consider a special rule because, when 50% of the businesses are affected, a determination about the significance of the effect needed to be made.

Ms. Menchaca stated that staff would need to look at "substantially the same manner" and create specific language creating a test for businesses, and noted that if the language was deleted, she did not know how the special exception would fit.

Chairman Getman explained that she did not want to see "substantially the same manner" be used in the "business climate" rule if it resulted in eliminating the "business climate" rule. She suggested that staff report to the Commission how "substantially the same manner" will work with a "business climate" rule that does not require that every business has to be affected in substantially the same manner, but is not so severe that public officials cannot use it.

Ms. Menchaca suggested that staff bring a revised proposal for Decision 9, options a and b to the

Commission at a later date, so that staff can do further analysis on the issues. There was no objection to Ms. Menchaca's request.

Mr. Wieg stated that the statute indicates that the effect must be more than a *de minimus* effect.

Ms. Menchaca explained that Decision 10 pertained to regulatory language addressing issues raised by members of the community that landlords may be disqualified more frequently than tenants and that the result is unfair. She explained that option a was language provided by the Greater San Francisco Association of Realtors, option b was a staff proposal, creating a special rule with limiting factors allowing that enough people have to be affected and that the effect must be similar and includes residential property only.

Ms. Menchaca referred the Commission to a comment letter from Thomas A. Willis on behalf of the Greater San Francisco Association of Realtors, noting that they preferred option a, but were not opposed to the staff proposal, and urged that some language be adopted.

Chairman Getman stated that she was uncomfortable creating a special rule for rent control, noting that there are other similar issues, such as cable television, which might require special rules also if the Commission makes a special rule for rent control. She suggested that the Commission approach the issue in a broader context, creating a regulation which would apply to issues affecting local communities.

Commissioner Makel stated that the Commission created a rule in which both landlords and tenants have the same level of conflict, and only one is not allowed to participate, and that the problem needs to be fixed. She added that if there are other similar situations, a broader approach would be a good idea, but noted that she had no problem setting up a special rule for this case if it was a unique situation.

Commissioner Deaver stated that the cable access issue is probably a one-time issue, and that rent-control is an issue which will not go away, and noted that there may be other issues which have not yet been considered. He agreed that it was unfair for public officials on one side of an issue to be allowed to participate while public officials on the other side of an issue were not allowed to participate.

Tom Willis, on behalf of the Greater San Francisco Association of Realtors, stated that there should be a special rule for this issue, and added that there already is a special rule to handle cable access, and referred the Commission to regulation 18707.1, which set up a special rule for situations when general rates, fees, or taxes are at issue. He noted that rent control is not defined as a general rate, fee or tax and therefore does not fall under that regulation. Mr. Willis stated that it was critical to make a decision on this issue because most big cities have or will be considering rent control laws. He noted that a tenant, a single-family resident owner, and possibly a landlord with three rental units can always vote, but no one else can vote. This rule, he added, is not fair and shuts down discourse.

Mr. Willis explained that his clients did not want to create a rule which would allow wealthy persons to vote on things that would help them, but wanted to create a rule which allowed full disclosure of where officials stand on the issues. He noted that Decision 10 option b was a very acceptable approach to the issue, maintaining the "public generally" definition, while at the same time applying one standard to everyone.

Ms. Menchaca stated that the primary difference between the proposals was that option b would not allow the exception if the public official had a direct impact, and it would require that a certain percentage of residential properties in the jurisdiction would have to be affected. She noted that, unlike rent-control, the "land-owner voter" regulation existed because of legislative policy.

Ms. Marshall reminded the Commission that the issue was coming out of San Francisco, and there was a lot of confusion in San Francisco about whether anybody who has any real property interest can vote on rent-control matters. She stated that people are erroneously being advised that they cannot vote if any rental units are owned by the public official, and noted that some public officials are using that advice to shield themselves from having to vote on controversial issues. She stated that if there were clarification that small property owners can vote, a lot of the frustration would be eliminated.

Ms. Marshall opposed a special rule for rent-control, noting that it would be perceived as a special interest rule at a time when there is a huge housing crisis, high rental rates, and more money to be made. She stated that this is a time when renters need more protection than ever, and that if people with a material financial interest are allowed to vote, it would take away that protection. Ms. Marshall stated that renters do not have a business interest and large landlords do. She noted that the Act provides that if a public official has a material financial interest, participation in a decision affecting that interest is not allowed unless it is not distinguishable from the public generally. She did not think that the Commission could adopt a regulation which makes an exception for people who own a lot of property in this special controversial situation. She stated that it did not comply with the law or with common sense that someone who owns a lot of rental property and can have huge financial gain, could be considered part of the "public generally," and noted that their interest is not the same interest as that the rest of the population.

Chairman Getman stated that a tenant has a financial interest.

Ms. Marshall responded that it is the same one that the general public has, and compared it to allowing the oil companies or the telephone companies to make the rates for their industries. She noted that the general public is affected as rate payers, not rate makers, and that it is distinguishable because it is not a business interest. The law, she stated, relates to business interests, not consumer interests.

Commissioner Makel questioned how it could not be considered the "public generally" when it

applies to all tenants just as it applies to all landlords.

Ms. Marshall responded that landlords are a small percentage of businesses, but that everyone needs housing.

Ms. Menchaca explained that tenants do not have a real property interest, and that a public official who is a tenant could be disqualified, but the "public generally" rule makes an exception for tenants.

Commissioner Makel pointed out that the tenant will always escape the conflict because there are more tenants than landlords. Both the tenant and the landlord, she stated, have the same level of conflict on a rent-control issue, and she believed that to be fundamentally unfair.

Ms. Marshall disagreed because she believed that tenants were dealing with basic living costs and landlords were dealing with how to make money.

Commissioner Makel noted that the statute deals with "financial effect" and that there would be a financial effect for each council member on rent-control decisions.

Ms. Marshall responded that many people are affected by rent-control, noting that 70% of the people in San Francisco are renters and, as such, are affected in the same way. Landlords are affected differently because it is their business.

Commissioner Makel observed that the philosophical argument is one that could be made in debating whether rent-control is good or bad, but did not believe it to be relevant to the question before the Commission.

Ms. Marshall suggested that the Commission clarify the rules as a first step, so that small property owners understand that they can vote, rather than saying that people who have hundreds of units are considered part of the "public generally."

Chairman Getman stated that if, in San Jose, a proposal was brought before the council to enact a rent-control ordinance, tenants could vote on the issue, but landlords could not.

Ms. Marshall noted that large landlords could not vote, and noted that she believed it to be fair that a public official who had a very small interest in a limited partnership could not vote on the issue either, because rent-control could have a material financial affect on their finances.

Commissioner Makel noted that both tenants and landlords could be disqualified, and that they should not be treated differently.

Commissioner Deaver suggested that the solution to the problem is to disclose everything, and if the voters do not approve the public officials' actions then the public official will not be

reelected.

Ms. Marshall responded that the Fair Political Practices Act would not allow it.

Commissioner Deaver stated that perhaps the Act should be changed to reflect reality.

Chairman Getman stated that the tenant has a huge financial interest.

Commissioner Makel stated that if the situation were reversed, and there were more landlords than tenants, it would still be unfair to disqualify the tenants and not the landlords.

Commissioner Deaver noted that in one California city where there is a very large area of bare land, and a very small city, the council regularly votes for parcel taxes that affect people who live all over the world.

Ms. Menchaca suggested that the Commission discuss Decision 11 option b, which would codify the *Ferraro* decision, and would create a special rule allowing landlords with three or fewer units to participate in a decision, and noted that it would disqualify the large landlords and would allow the smaller landlords to participate.

Mr. Wieg clarified that the issue of participation of landlords at a local level is not just a San Francisco problem, but affects rent-control jurisdictions in Southern California that are equally radical. He did not support the codification of *Ferraro* but did support Decision 10, options a and b, because it gets participation into the system. He explained that the Political Reform Act was designed to ensure fair access to the system, and not to exclude people. Otherwise, he stated, public officials would be forced into a situation where they would have to go through machinations and take up a writ on every person. He did not believe that this made sense, and noted that somebody has to vote.

Mr. Willis stated that, if the Commission does not make a change, five out of eleven supervisors may not vote on rent-control issues. He believed that the current rule was a special interest rule favoring tenants and small landlords.

Mr. Martello stated that he worked with rent-control, and he learned that it is very difficult for public officials not to vote their own self interest on rent-control issues.

Chairman Getman questioned whether the self interest of a public official who is a landlord would be to increase the rents because it would be profitable, or to continue rent-control because 70% of the voters are renters.

Mr. Martello responded that rent-control was popular among public officials in the Los Angeles area because it drove rental rates up during a recession. He pointed out that tenants believe that if they are not allowed to vote as public officials, rent-control will not happen. He supported

clarification of the rule, and stated that either both landlords and tenants should be able to participate as public officials, or neither group should be able to participate.

Chairman Getman questioned whether references to rent-control should be removed from Decision 10, option b, making the statute that discusses decisions affecting residential properties in a jurisdiction more general.

Commissioner Makel suggested a more general approach.

Commissioner Deaver suggested that it may be a constitutional issue.

Chairman Getman proposed that Decision 10, option b language be changed. She suggested that the words, "that is subject to rent control" be deleted from subparagraph (a), and that the words "rent control or" be deleted from subparagraph (1) and add in its place, "the rights or liabilities of tenants and owners," and the word "rental" be deleted from subparagraph (4) and subparagraph (5), and change the heading "Rent Control Decisions," to "Residential Property Decisions." She stated that decisions that affect residential properties need to be voted on by the public officials.

Ms. Menchaca stated that she would focus on "the meaning of respective rights or liabilities of tenants and owners," in the proposal by Chairman Getman, preparing some language to look at the issue.

There was no objection from the Commission to considering in September the changes proposed by Chairman Getman and Ms. Menchaca.

Ms. Menchaca presented Decision 11, option a, which would codify the Commission's *Overstreet* opinion holding that all tenants in the jurisdiction constitute a significant segment. Ms. Menchaca stated that she did not believe that the 10% population test was necessary. She also explained that Decision 11, option b, would codify the *Ferraro* rule, establishing a "bright line" test determining whether a "substantially similar manner" rule applies to landlords with three or fewer units.

Chairman Getman suggested that Decisions 11 and 13 should be brought back to the Commission because changes suggested in Decision 10 would affect them.

Ms. Menchaca noted that option a of Decision 11 may fit under the 10% population test, and that, if so, she suggested that it not be brought back to the Commission.

Chairman Getman agreed, but noted that once the Commission considers Decision 10, they will want to see how that decision affects *Ferraro* and *Overstreet*, as well as redevelopment issues.

Commissioner Swanson requested a comparison in chart form at the September meeting.

Chairman Getman clarified that Decisions 11 and 12 should be brought back to the Commission, noting that there were two Decision 13's in the staff memo, and the first one should have been numbered Decision 12.

Ms. Menchaca presented Decision 13, clarifying Regulation 18707.1, applying to the special rule for rates, assessments, and similar decisions. She pointed out that the current regulation refers back to the "general rule" when discussing "significant segment" and that it is difficult to reach the "50% of businesses" threshold. Staff proposes, she stated, that if 10% of the property owners receiving services from the official's agency are affected, the public official would be allowed to participate.

There was no objection from the Commission to accepting the staff recommendation in Decision 13.

Ms. Menchaca introduced Decision 14, amendments to proposed regulation 18707.4, clarifying application of the "public generally" exception if an appointed public official has a reasonably forseeable material financial effect but was appointed to that position because of his or her expertise in the field that causes the material financial effect.

There was no objection from the Commission to approving staff recommendations in Decision 14.

The Commission adjourned for lunch break and closed session at 12:45. The meeting reconvened at 1:23 p.m.

Item #6. Approval of Materiality Standards for Real Property Economic Interests--Regulations 18704.2 and 18705.2 (Conflicts Project, Phase 2, Project D).

Staff Counsel John Vergelli presented the proposal, noting that many people are unhappy with the current "middle zone" materiality standards, which measure materiality by assessing the dollar impact of a government decision on the public official's real property and determining whether it is substantially likely to be $10,000 or more, or $1,000 on fair market rental value in a twelve month period. He noted that the Commission had tentatively decided to determine whether the real property was directly involved in a decision on the basis of being within 300 feet of the property which is the subject of the decision. The Commission now needed to decide what to do with the "middle zone," which is that area between the "too close zone" and the "far enough away" zone (more than 2,500 feet away from the real property which is the subject of the decision).

Mr. Vergelli noted that Rene Chouteau, the City Attorney of Santa Rosa, proposed that the middle zone be included in the "far enough away" zone, and that several options for implementing that notion were contained in the staff memorandum. He explained that the Commission had requested that staff develop an option to retain a "middle zone" and develop a test for it that does not utilize a dollar based test to evaluate materiality, but that staff was not

able to do that because the notion of the middle zone was that it was an area that cannot be engaged in presumption making, and that the facts of each situation would have to be studied in each case to determine whether it is material.

If the Commission decided to keep its decision to keep the "too close zone" rule as a test for direct involvement, Mr. Vergelli explained, and if the Commission decided to eliminate the "middle zone," the presumption of materiality rule would apply to all real property directly involved in the government decision, and there would be a rule to be applied to all indirectly involved real properties.

Chairman Getman requested input from the Commission regarding whether to develop two or three zones.

Commissioner Makel stated that she did not like the "middle zone," because it seemed impossible to apply.

Commissioner Deaver agreed that two zones were a good idea because it was simpler.

Commissioner Swanson and Chairman Getman agreed.

Mr. Vergelli stated that if the "too close zone" rule is to be another test for whether the property is directly involved, and without the "middle zone," the only option available focuses on the relative uniqueness of the decision to evaluate materiality. He explained that the idea came from the "public generally" rule, but noted that, under the statute, "materiality" and "public generally" are two different things, and that the distinction between the two should be maintained even while using "uniqueness" of the financial effect as a way to gauge materiality. He suggested the notion that the more unique the financial effect is on the public official's real property, the more likely it is that the effect will be material. However, he also pointed out that because uniqueness may or may not be inconsequential, it is not necessarily a good measure of materiality.

Chairman Getman noted that with the two-tiered test, more presumptions were being created and included the presumption that within the "too close zone" it was presumed that there is a material financial effect that is distinguishable from the "public generally," and outside that zone there is the presumption that the effect is not distinguishable from the "public generally."

Mr. Vergelli stated that staff has, for twenty-five years, considered whether the effect was distinguishable from its effect on the public generally only after it has preliminarily been determined that it is a material financial effect, and otherwise agreed with Chairman Getman. With the two-part scheme, he said, it is explicitly presumed to be material if the public official is directly involved, and it is presumed to not be material in indirectly involved cases. These presumptions, he clarified, can be rebutted.

Chairman Getman noted that if the Commission decided that "public generally" is not an

exception but is part of the element, then it makes sense.

Mr. Vergelli clarified that the Commission would not be writing a "public generally" exception rule, but is using one of the concepts in the "public generally" exception and moving it and then adapting it to make it a materiality rule.

Commissioner Swanson left the meeting at 1:40 p.m.

Chairman Getman disagreed, stating that there should be two different elements which include presumptions of materiality and presumptions that it is not material, and that the public generally rule is an element in both of them.

Commissioner Makel questioned whether there is anything between a uniqueness analysis and a dollar figure which could be considered.

Chairman Getman stated that there is a presumption of materiality in the "too close zone," but that the presumption can be rebutted by showing that it is indistinguishable from the public generally. In the outer zone, she explained, the presumption is that it is not material unless it is distinguishable from the public generally.

Mr. Vergelli suggested that there could be a presumption of materiality with two possibilities for rebutting that presumption. The first opportunity would be step 5, where it is decided whether the financial effect is material, the second opportunity would be to use the "public generally" exception in step 7. In the second opportunity, he explained, it has already been decided that there is a material financial effect, but the official can participate because of the "public generally" exception. The whole notion behind the eight-step process was that the same process could be used each time by following the steps, and Mr. Vergelli noted his concern that this new process could end up appearing to bypass step 6.

Ms. Menchaca pointed out that the public officials would not care about the 300 foot presumptive rule because the proposal would shift the burden of proof for the "public generally" exception to Enforcement staff.

Chairman Getman referred to previous testimony by Robert Leidigh, who stated that, historically, it was not necessary to go through all eight steps of the conflicts analysis if "reasonable foreseeability" was considered.

Mr. Vergelli responded that such reasoning is still valid if the public official can show that whatever materiality standard is applied to the economic interest, even the strictest one, it would not be reasonably forseeable that the standard would be met.

Commissioner Makel noted that the difficulty with using a "uniqueness" standard would occur in the "outer zone" standard.

Mr. Vergelli responded that there is a potential problem of collapsing the "public generally" exception with the materiality standard, depending upon how the "uniqueness" test is set up. One option would be to use the inverse of the "public generally" test.

Commissioner Makel noted that nothing is gained from that test because that test is already being applied in the "public generally" exception.

Mr. Vergelli explained that it was a concern, but that even though step 5 might preordain part of the results, step 7 would still be necessary to determine if other special purpose "public generally" exception tests applied.

Mr. Vergelli stated that another option would be to change the "uniqueness" measure so that it is a materiality test in a way that makes it different enough from the "public generally" exception, so that answering the questions in steps 5 and 6 would not necessarily preordain the results of step 7.

Rene Chouteau, City Attorney for Santa Rosa, stated that the key issue was what to do with the area beyond the "inner zone," and suggested that a "bright line" standard should be the goal of the Commission. He noted that if a bright line standard is adopted in the "inner zone," it would offer a simple approach which would make interpretation easier for public officials. He suggested that "uniqueness" tests should be defined narrowly, and noted that if it is tied to the "public generally" exception it may become much too easy to find a conflict. Mr. Chouteau further suggested that the effect must be uniquely applicable to the property in question and the immediately surrounding properties.

Mr. Chouteau stated that the existing "outer zone" 2,500 feet circle is too broad, and suggested that it be tightened up. He noted that it could mean that the "inner zone" be larger than 300 feet.

Mr. Vergelli stated that Mr. Chouteau's proposal could be viewed as a dramatic weakening of the current rules.

Staff Counsel Melodee Anderson stated that she knew of no Enforcement cases involving property in the "outer zone".

Mr. Chouteau noted that he had understood that there had not been an Enforcement action outside the middle zone, and that the fear of missing a conflict in that zone was not realistic.

Mr. Vergelli agreed, but noted that the Commission is considering changing the "outer zone" boundary from 2500 feet to 300, 400, or 500 feet from the property in question. He added that even if there had not been an Enforcement action beyond 300 feet, both the deterrent impact of the current rule as well as the perception that the FPPC should be tough on conflicts, should be considered.

Mr. Vergelli explained that the current test (1) questions the specific circumstances of the decision that might financially affect the public official's property, and (2) analyzes the properties within 2500 feet of the public official's property and can determine that a conflict

exists even though the property is more than 2500 feet from the property that is subject to the decision.

Mr. Martello stated that the "middle zone" has caused public officials to be disqualified from participation, primarily because it is imprecise. He stated that a "bright line" test would be best, and cautioned that a "uniqueness" test would be subject to different interpretations. He reminded the Commission that, in addition to FPPC regulations, public officials still have to deal with the appearance of impropriety, common law conflicts, as well as the ballot box to guide them on conflicts questions.

Mr. Vergelli pointed out that the regulated community requested the current regulations in 1984 because they wanted more objective standards, and that now, the regulated community wants to go back to the more subjective standards.

Chairman Getman stated that the Commission had two considerations: (1) That they are the guardians of the conflicts law, and (2) that they lose credibility as a Commission if the rules are too hard to understand and enforce, and are perceived as unfair. She noted that this rule is one of the most difficult for a public official to interpret, and that she was very comfortable with creating a rule which is easier to apply even if it means that it must be revisited later if loopholes are inadvertently created.

Senior Commission Counsel Deanne Canar stated that factors outlined in the regulation dealing with the proximity of the real property which is the subject of the governmental decision, the magnitude of the proposed project, whether it will affect development or income potential, and whether the decision will result in change to the character of the neighborhood are considered by Enforcement staff when determining whether a conflict exists.

Mr. Vergelli explained that Decision 2, option a, tried to keep as much of the current "outer zone" rule as possible, but eliminated the dollar tests. Decision 2, option b applied the "inverse public generally" test, by taking the current "public generally" "significant segment" definition that applies to real property and stating it as a materiality standard, and eliminates the second 2,500 foot circle test. He noted that step 6 of the standard analysis would work with the rule.

Mr. Chouteau stated that he did not think that option b would work because it forces the public official to determine whether 10% of the people living in the jurisdiction would have the same effect. He suggested a much more limited standard which would tie the uniqueness of the effect to a smaller number of parcels. He noted that the 2,500 foot circle makes a lot less sense when there is a reduced circle of a presumption of effect. Mr. Chouteau supported a narrow and tough standard which would allow public officials to assume that they do not have a conflict outside of the "inner circle" unless there are unique circumstances that are readily apparent.

Chairman Getman asked whether the factors referred to by Ms. Canar could be incorporated into a very specific test to determine whether the presumption applied.

Mr. Chouteau responded that it would be a good test.

Commissioner Makel stated that she did not want the dollar test to be included.

Chairman Getman stated that she did not want two circles to be included. She asked whether the inclusion of tests for "significant" or "unique" would solve the problem of a potential collapse of "public generally."

Mr. Vergelli responded that it would, in that they would be very different tests.

Mr. Vergelli pointed out that if the Commission chose to accept Mr. Chouteau's proposal, then the 300 foot "inner circle" should be extended.

Mr. Chouteau noted that the 300 foot rule is based on the *Horn vs City of Ventura* decision which defined the constitutional limits of required notice for decisions affecting real property. He noted that the 300 foot rule could be extended.

Chairman Getman stated that she was concerned that the current rules did not keep some public officials from participating in cases where a conflict did exist.

Mr. Vergelli suggested that the Commission could consider setting up different distance tiers, one for urban and one for rural areas.

Commissioner Deaver stated that it might depend on the type of project under consideration.

Mr. Vergelli responded that the "no presumptions' middle zone" was first established in 1985 because the type of project could make a difference.

Mr. Chouteau stated that most people did not see a conflict beyond 300 feet.

Mr. Vergelli stated that if a decision regarding the location of a proposed major freeway offramp were being considered, and it was close to a public official's residence, but beyond 300 feet, most people would see a potential conflict, and he noted that there are other examples. He explained that the inclusion of specific factors in the regulation may not necessarily be helpful, because people may get so comfortable with the presumption that there is no conflict if outside the "inner circle" test that they would not look at the specific factors, or, conversely, that people may focus intently on the factors and argue about their interpretation.

Chairman Getman stated that she was comfortable with the possibility of missing a possible conflict if it meant simplicity and rules that can be enforced, and added that it strengthened the conflict rules.

Mr. Martello noted that in *Horn vs County of Ventura* the court used the words "substantial" and "significant" effects, and that the 300 feet was extended by the state Legislature for other circumstances. He stated that the proposed criteria covered just about everything. Mr. Martello suggested 450 or 500 feet for the "inner zone," noting that 450 feet would be a 50% increase and roughly equivalent to a city block, making it easy to use. He noted that he could not remember a situation where a member of the public complained in a public meeting that a public official's property was too close to the property under consideration, however he did recall criticism against public officials for not participating. Mr. Martello suggested that the Commission could require an analysis to determine if a conflict exists if the property is beyond the "inner circle."

Chairman Getman and Commissioner Makel supported Mr. Martello's suggestion.

Chairman Getman noted that the 450 foot proposal would be roughly equivalent to 2 acres.

Commissioner Makel questioned whether 2 tiers would be a good idea.

Commissioner Deaver favored 1 tier, noting that it should work in most cases.

Chairman Getman favored 1 tier, noting that if there were more than 1 tier, there would need to be at least 3 tiers; urban, suburban, and rural.

Commissioner Makel pointed out that the City of Dixon was 3.8 square miles, and the area of the City of San Francisco was 46.7 square miles, and noted that the effect of a decision on property 450 feet away might be different in the two cities.

Chairman Getman pointed out that within the 2500 foot circle in Dixon, there would be a population of about 2,000 people, while in San Francisco it would be about 11,500 people.

Commissioner Makel stated that she would support extending the "inner circle" to 450 feet, and would consider extending it further.

Chairman Getman suggested a 500 foot "inner circle," noting that it would be beyond a city block and more than 2 acres out.

Mr. Chouteau stated that anything between 300 feet and 500 feet would be fine.

There was no objection from the Commission to extending the "inner circle" to 500 feet (Decisions 2 and 3).

Chairman Getman adjourned the meeting for a break at 2:40 p.m. The meeting reconvened at 2:50 p.m.

Chairman Getman announced that Staff Counsel John Vergelli had accepted a position in Washington D.C., and thanked him for his work on the Phase 2 program, noting that the program would never have happened without his hard work.

Mr. Vergelli asked the Commission to consider what must be shown by a public official to rebut the presumption of materiality. He reminded the Commission that they had preferred the "any financial effect" standard to continue to be what must be shown to rebut the presumption for business entities. He recommended that they keep the same standard for real property.

There was no objection from the Commission to keeping the current "any financial effect" standard (Decision 1).

Mr. Vergelli explained that Enforcement Division suggested that the words "or substantially" be removed from the "Streets, water, sewer, etc." rule. He noted that the rule has been tentatively changed from a rule to test for materiality to a rule to test for deciding when real property is directly involved in a decision. Enforcement recommends the deletion, Mr. Vergelli explained, because it removes a subjective word from the regulations and makes the regulation clearer and easier to enforce.

Mr. Vergelli noted that the argument against removing the words "or substantially" from the regulation, is that they make an effective "safety valve" to deal with situations where a public official may, technically, receive new or improved services in a trivial sense, but do not rise to the level of creating a bias on the part of the public official.

Chairman Getman stated that she was not comfortable taking out "or substantially" because it could bring in too many potential "conflicts."

Senior Counsel Deanne Canar reported that the City Attorneys had suggested that "or substantially" be replaced with "except for repairs, replacement or maintenance on existing facilities."

A representative from the City Attorneys explained that the exception should be limited to services that would be continued, and not new or improved services.

Mr. Vergelli stated that Legal Division had no concerns regarding the suggestion, and noted that the suggestion would be brought back to the Commission for further consideration.

There was no objection from the Commission to the City Attorney's suggestion.

Mr. Vergelli introduced Decision 5, noting that some aspects of it are substantive, and some are more "clean-up" in nature. He clarified that it was an inadvertent mistake that had been in existence for twelve years. Advice letters, he noted, have said that leaseholds can only be considered directly involved under Regulation 18704.2 (a)(2) through (5), because 18704.2 (a)(1) has a specific exemption in it, even though it may seem absurd.

Chairman Getman noted that there may be times when a property leasehold interest does not

have the same kind of interest that a property ownership interest would have, and wondered if the omission was really inadvertent.

Mr. Vergelli responded that the rulemaking files from 1988 were incomplete, but that there was some scant evidence that there was an intent to include a special regulation for leaseholds, which would explain why the exclusion was put in what is now Regulation 18704.2 (a)(1). He speculated that they meant to go back and do something with it later, but never did.

Mr. Vergelli noted that the Commission already made a policy decision when it adopted the regulation that excluded month-to-month tenancies from being an interest in real property, possibly because the tenancy interest is different than an ownership interest. Leasehold interests can be very different from each other too, he pointed out.

Commissioner Deaver stated that there are people with month-to-month tenancies who have a substantial involvement, and he gave Union Pacific Railroad as an example, noting that there are a lot of very substantial businesses who have month-to-month tenancies from Union Pacific Railroad.

Mr. Vergelli explained that the month-to-month leasehold issue would be a good argument for approving Decision 5, which would require an indirectly involved materiality standard to be applied in all cases. If decision 5 is disapproved, leasehold interests would be treated the same as other kinds of interests in real property.

Chairman Getman supported the staff recommendation to treat leaseholds as indirectly involved interests.

There was no objection from the Commission to support the staff recommendation.

Mr. Vergelli noted that this was his last meeting, and it was an honor to work for the FPPC.

Ms. Canar clarified that the exception in Decision 4 would not take the place of substantially, but that staff's Appendix A proposed Regulation 18704.2 (1)(5) should read:

The governmental decision involves construction of, or improvements to streets, water, sewers storm drainage or similar facilities, and the real property will receive new or improved services. New or improved services do not include replacement, repairs, or maintenance on existing services.

Item #7. Legislative Report

AB 1838 (Leonard)

Commission Counsel/Government Relations Director Mark Krausse advised the Commission

that this Realtor sponsored bill would provide language that would not be a codified change to the law, but would be legislative intent language directing the Commission to adopt regulations similar to those just discussed. The language in the bill, he noted, was a compromise between language proposed by the FPPC and language proposed by the Realtors.

Mr. Krausse explained that both Enforcement and Legal Divisions had reviewed the bill, and the only language he had received objections to was on line 8, "To avoid confusion over terms of the Act." He suggested that the line be deleted, so that it read, "In order to prevent an unnecessary chilling of participation in the governmental and regulatory process. . . ." He suggested that, "as a result of disqualification" could be added to the end of the sentence, and noted that staff did not necessarily agree that confusion was the problem.

Mr. Krausse noted that the last paragraph on page 3, lines 10 - 15, discussed the Realtors' original position on industry, trade or profession, and states that the FPPC should be directed to adopt regulations that would clarify that one industry, trade, or profession is not necessarily prohibited from constituting a significant segment in order to get to "public generally." He requested guidance from the Commission regarding whether it was comfortable with that statement, noting that he thought it to be a fair statement.

Mr. Wieg stated that the Realtors were comfortable with striking out the phrase referring to "confusion," and he believed that Mr. Leonard would also be comfortable with the suggestion. He explained that the latest amendment was an attempt to respond to the Commission's "oppose unless amended" position, and requested that the Commission withdraw its opposition to the bill.

Chairman Getman stated that she was not uncomfortable with paragraph 3 because if 50% of the businesses are affected, it should not matter whether they are from one "industry, trade or profession," and that she would support withdrawing the opposition to the bill. She noted that she did not think the bill was necessary because the Commission is already moving in directions consistent with the bill. She suggested that the Commission take a neutral position on the bill.

There was no objection from the Commission.

SB 917 (Polanco)

Mr. Krausse explained that staff hopes that this bill will solve the problem with petition circulators which had been brought to the Commission before in the Colorado case of *Buckley vs. ACLF*. This proposed bill, he noted, would make clear that Section 84211 (r) is unconstitutional in requiring that payments to ballot circulators to be reported in amount, name, and amount paid to ballot circulators. This bill, he stated, would repeal that section, but since the bill did not include an urgency clause, it will not become law until January 1, 2001.

Chairman Getman explained that the bill is on the Governor's desk, and that she was requesting

ratification of a decision by Commissioner Deaver and Chairman Getman to move repeal of the ballot circulators disclosure requirement to this bill, since the forms legislation was not moving. There was no objection from the Commission.

SB 1223 (Burton)

Mr. Krausse reported that this bill has gone to the Governor and he is expected to sign it.

Chairman Getman stated that this bill would place a campaign finance measure on the ballot for November that would repeal sections of Proposition 208. She noted that the Commission had decided that once a measure was on the ballot, the Commission was precluded from taking a position on it, and that, therefore, the Commission would just be tracking it as an informational item and would not be taking a position on it.

BUDGET

Mr. Krausse reported that the Governor signed the budget, including the Commission's proposed budget augmentation providing for a new FPPC Public Education Unit.

AB 974 (Papan)

Mr. Krausse explained that the Governor returned this bill to the Senate last year over objections about the lobbyist audit trigger language, and that the language had been removed and the bill has been returned to the Governor. He hoped that the Governor would sign within the next twelve days.

AB 746 (Papan)

Mr. Krausse stated that this bill is proposed to resolve the foreign principal issues, and that it is back in the Assembly for concurrence, but had to be withdrawn to the Assembly Committee for their review after the summer recess. He reported that it will not become law until January 1, 2001, if signed.

Chairman Getman noted that the FPPC is being sued over that issue and that the court hearing is Monday, July 10.

SB 2076 (Polanco)

Mr. Krausse reported that this bill is in the Assembly Elections Committee and that it may have trouble because legislators are sometimes reluctant to change the PRA. He noted that staff is still pursuing it and that they have taken out a recent amendment to remove the asset reporting at the request of Senator Mountjoy.

Chairman Getman explained that Staff Counsel Mark Morodomi was leaving the FPPC, and had

served as Acting Enforcement Division Chief and presented a resolution of the Commission thanking Mr. Morodomi for his services as Acting Enforcement Division Chief and for his "wonderful leadership, and knowledge, and good cheer."

Item #9. In the Matter of Theodore Warren Jackson, FPPC No.99/606. (Default Decision and Order).

Chairman Getman reported that this item has been withdrawn from the agenda because the Enforcement Division has reached a stipulated settlement in the matter which will be presented to the Commission in August.

Items #8, #10, #11, and #12.

There being no objection, the Commission approved on consent the following items:

Item #8. ***In the Matter of Marla Wolkowitz,*** **FPPC No. 2000/146.**
Item #10. ***In the Matter of Zurich Commercial,*** **FPPC No. 99/507.**
Item #11. ***In the Matter of Stephen B. Gorman, Committee to Elect Stephen Gorman Judge District #3, and John F. Warden, Jr. Treasurer,*** **FPPC No. 99/82.**
Item #12. ***In the Matter of Committee for Local Awareness and Armen Tashjian,*** **FPPC No. 99/711.**

Item #13. ***In the Matter of William ("Bill") Merriman,*** **FPPC No. 99/63.**

Senior Staff Counsel Deanne Canar presented the enforcement case against Lake County Supervisor Bill Merriman for participating in discussions relative to land zoning decisions for property in which he had a financial interest.

Ms. Canar reported that prospective purchasers of that land had made an offer to purchase the property contingent upon several factors, including having a Laundromat and mini-storage constructed on the property, which would require a zoning change. Ms. Canar reported that Supervisor Merriman directed a real estate agent contact another supervisor to request the zoning change, and noted that the real estate agent wrote the letter but did not disclose that Supervisor Merriman stood to benefit by the zoning change.

Ms. Canar stated that when the matter came before the Lake County Board of Supervisors, the motion to rezone the property failed for lack of a second and the proposal was returned to staff for further study.

Ms. Canar recommended a $1,500 fine for one count of active participation in the decision. She noted that the factors considered in arriving at the fine included the deliberate nature of the concealment, and the fact that it was a very early preliminary decision and the issue did not come to a vote. She added that she could find only one similar enforcement decision, and in that case the fine for one count was $1,000, but there was no deliberate concealment in that case. She

noted that Supervisor Merriman checked to see if it was appropriate for him to second the motion and vote on the motion after the discussion, and when he was warned that it may not be appropriate, he abstained and the motion did not go forward. At that point, Ms. Canar stated, Supervisor Merriman publicly stated that he had a financial interest in the property.

Commissioner Makel agreed that the fine was appropriate.

Commissioner Deaver stated that he would have preferred a $2,000 fine, but was willing to approve the $1,500 fine.

There was no objection from the Commission to approving item #13 on consent.

Item #14. Litigation Report.

General Counsel Kathy Gnekow reported that on Monday, July 10th, Mr. Krausse would be appearing in court for the *Kao v. Karen Getman* case. She noted that a provision in the California constitution prevented the Commission from making a determination as to whether or not it is a constitutionally allowed restriction to not allow U.S. citizens to contribute to a campaign, and the case will allow a court decision on the matter.

Ms. Gnekow also reported that the FPPC was going to trial in the Proposition 208 case on Tuesday, July 11th, and that the plaintiffs are expected to occupy courtroom time with witnesses Tuesday, Wednesday, and Thursday, and that Senior Staff Counsel Larry Woodlock and Staff Counsel Deborah Allison would begin their case Friday, July 14th and are expected to continue presenting witnesses the following week.

Item #15. Executive Director's Report

Executive Director Wayne Strumpfer reported that, in addition to items reported on his memo, General Counsel Kathy Gnekow was returning to the Attorney General's Office to work in the Public Rights Division and would be leaving the FPPC.

Chairman Getman complimented Ms. Gnekow on her work while at the FPPC.

Ms. Gnekow noted that she enjoyed working at the FPPC.

Items #16, #17, #18, #19, #20 and #21.

Chairman Getman reported that the following items were not considered in closed session:

Item #16. ***California ProLife Council Political Action Committee v. Scully.***
Item #17. ***California Strawberry Commission v. Fair Political Practices Commission.***
Item #19. ***Kao v. Fair Political Practices Commission.***

Item #20. ***Brown v. Fair Political Practices Commission.***

Chairman Getman reported that the following item was considered in closed session:

Item #21. Discussion of Personnel. (Gov. Code § 11126(a)(1).)

Dated: July 7, 2000

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Getman